

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
WINCHESTER PROPERTIES, INC.	:	DETERMINATION
T/A SIGN OF THE DOVE	:	DTA NO. 814352
	:	
for Revision of Determinations or for Refunds	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1992	:	
through November 30, 1992.	:	

Petitioner, Winchester Properties, Inc., T/A Sign of the Dove, 1110 Third Avenue, New York, New York 10021, filed a petition for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the period March 1, 1992 through November 30, 1992.

A small claims hearing was held before Arthur Johnson, Presiding Officer, at the offices of the Division of Tax Appeals, 90 South Ridge Street, Rye Brook, New York, on January 30, 1997 at 9:15 A.M., with all briefs to be submitted by March 15, 1997. Petitioner appeared by Stewart Buxbaum, CPA. The Division of Taxation appeared by Steven U. Teitelbaum, Esq. (James Cartwright).

ISSUE

Whether the penalty and a portion of the interest imposed by the Division of Taxation for petitioner's failure to timely file and pay sales taxes due for the period March 1, 1992 through November 30, 1992 should be abated.

FINDINGS OF FACT

1. Petitioner, Winchester Properties, Inc., filed its quarterly sales tax return for the period March 1, 1992 through May 31, 1992 on July 2, 1992 with payment of \$98,743.00 for the month of May 1992. Petitioner had previously timely filed and paid taxes due totalling \$174,846.00 on part-quarterly returns for the months of March 1992 and April 1992. The due

date for the quarterly return was June 20, 1992. On December 21, 1992, the Division of Taxation ("Division") issued petitioner a notice and demand which assessed penalty of \$9,874.30 and interest of \$445.68 for filing the return and paying the tax due late. On or about March 7, 1995, petitioner paid \$10,444.21 consisting of the penalty plus updated interest charges.

2. Petitioner failed to timely file and pay tax due on the part-quarterly returns for the months of June 1992 and July 1992. The returns were filed on August 6, 1992 and September 21, 1992, respectively, with payments totalling \$224,400.00. The quarterly sales tax return was also filed late without remitting payment of \$68,610.00 due for the month of August 1992. The Division issued a notice and demand dated December 21, 1992 for the unpaid taxes due of \$68,610.00 plus penalty of \$28,636.76 and interest of \$3,469.95, for a total amount due of \$100,716.71. On March 7, 1995, petitioner paid the tax due plus penalty of \$29,322.86 and interest of \$5,012.06.

3. Petitioner's part-quarterly sales tax return for the month of September 1992 was filed late on November 6, 1992, including the payment of the sales taxes due of \$99,880.00. The part-quarterly return for the month of October 1992 and the quarterly reconciliation return for November 1992 were timely filed and taxes paid. The combined taxes paid for the quarter amounted to \$319,800.00. Petitioner was assessed penalty of \$9,988.00 and interest of \$578.58 on a notice and demand issued February 26, 1993. Petitioner paid the penalty with updated interest charges of \$723.74 on March 7, 1995.

4. Effective March 1, 1992, petitioner filed a combined sales tax return that reported sales from the following restaurants:

Sign of the Dove
Yellowfingers
Contrapunto
Arizona 206
Ecce Panis

5. Prior to July 1989, each restaurant had a separate corporate structure. Between July 1989 and March 1992, there were various mergers of different corporate entities which resulted

in the formation of Aquilon Restaurants, Ltd., Maida Restaurant Corp. and 206 East 60th Street Corp. Petitioner was the last successor corporation from the mergers. All the different entities had the same ownership and involved the operation of the same restaurants.

6. On or about September 1987, Peter Yaffee was hired as the Director of Operations for the restaurant corporations. The corporations filed a verified complaint against Mr. Yaffee alleging that from November 1988 to July 1989, he embezzled funds of \$350,000.00.

Mr. Yaffee pled guilty to the crime of third degree grand larceny and executed an Affidavit for Judgement by Confession on June 29, 1990 for the sum of \$150,000.00.¹

On July 27, 1992, Maida Restaurant Corp. ("Maida") filed a petition for a hearing with the Division of Tax Appeals to abate and refund penalties and a portion of interest totaling \$50,168.05 it had paid for not timely remitting sales taxes due for the period May 1, 1989 through November 30, 1989.

The petition alleged that an embezzlement of funds in excess of \$250,000.00 caused the late payment of the sales tax. The petition also stated that Maida has timely paid all sales taxes due since recovering from the embezzlement and that the Internal Revenue Service (IRS) has waived penalties because of the embezzlement.

Rather than proceeding with a hearing, Maida and the Division entered into a Stipulation for Discontinuance of Proceeding, dated October 18, 1993, whereby the parties agreed to a refund of \$27,692.58.

7. On November 10, 1994, Aquilon Restaurant Corp. ("Aquilon") filed a petition for a hearing with the Division of Tax Appeals seeking to abate penalties and a portion of interest assessed for the sales tax periods ending November 30, 1990, February 28, 1991, May 31, 1991 and February 28, 1992. The petition also included penalties and interest for withholding taxes filed late for the periods June 30, 1990, June 30, 1991 and July 22, 1991.

The grounds for abatement given by Aquilon were the same as those stated in the petition filed by Maida. On February 22, 1995 and March 1, 1995, the Division of Taxation and

¹The District Attorney's office had examined the financial records of the restaurants and determined a verifiable loss of \$177,052.56 from embezzled funds.

Aquilon executed a Stipulation for Discontinuance of Proceeding wherein Aquilon agreed to a combined tax deficiency of \$925,987.20 plus minimum interest, and the penalties were cancelled. The stipulation also indicated that Aquilon had already made payments totaling \$1,138,986.20.

8. On September 14, 1995, Aquilon filed a second petition for a hearing to abate penalties and a portion of interest assessed for the sales taxes paid late for the period December 1, 1989 through August 31, 1990. The petition stated the same basis for abatement as the previous petition. This petition was also settled by stipulation, dated May 20, 1996, which cancelled all penalties.

9. On July 11, 1995, 206 East 60th St. Corporation ("206") executed a consent with Bureau of Conciliation and Mediation Services which cancelled penalties assessed for the sales tax periods ending August 31, 1989 and November 30, 1989 because of the embezzled funds.

10. In the petition filed for the periods at issue herein, petitioner has restated the reasons given by Maida, Aquilon and 206 in their petitions that resulted in stipulations or a consent granting the abatement of penalties and a portion of interest. Petitioner argued that these reasons established reasonable cause for the late payment of taxes with respect to the prior corporations and that similar treatment is applicable to this case. Petitioner submitted transcripts of IRS records showing that withholding tax penalties assessed by the IRS were abated through the tax period ending December 1992 for the same reasons.

11. The Division took the position that the prior agreements to abate penalties were not relevant to the periods at issue herein and that the embezzlement which occurred in 1989 did not establish reasonable cause for not timely filing returns and paying sales taxes due for periods in 1992.

12. The Division's representative at the hearing requested time to submit a memorandum of law following the hearing. The request was granted and on February 18, 1997, the memorandum was submitted by the Division's Office of Counsel. The memorandum was prepared by Brian J. McCann, senior attorney.

By letter dated February 25, 1997, petitioner's representative objected to the memorandum submitted by Mr. McCann as he did not take part in the hearing. Petitioner's representative maintained that the submission of a memorandum by a person who did not participate in the proceeding without express permission of the presiding officer was improper and should be disregarded.

CONCLUSIONS OF LAW

A. Tax Law § 1145(a)(1) provides for the imposition of penalty and interest for failure to file a return or pay over any tax when due. All of such penalty and that portion of the interest which exceeds the minimum amount prescribed by law shall be waived if the taxpayer can establish that the failure or delay was due to reasonable cause and not due to willful neglect (Tax Law § 1145[a][1][iii]; 20 NYCRR 536.1[c]). The absence of willful neglect alone is not sufficient grounds for not imposing penalties and interest or for cancelling penalties and interest (20 NYCRR 536.5[a]). The burden is on petitioner to prove it falls within the standard allowing for the abatement of penalty and interest (see, Matter of Yager, Tax Appeals Tribunal, March 23, 1989).

B. The defalcations by Mr. Yaffe were discovered in July 1989 and occurred over the period between November 1988 and July 1989. The embezzlement resulted in financial hardship and prevented the different corporations from timely remitting sales taxes and withholding taxes. The Division recognized the impact of the embezzlement and abated penalties and a portion of interest assessed against the different corporations through the period ending February 28, 1992. I believe the only issue is what length of time is reasonable to construe that the filing of returns and payment of taxes late was attributable to the embezzlement of funds.

Petitioner began filing returns reporting sales taxes due for all the restaurant operations in March 1992. Petitioner reported sales in excess of \$1,000,000.00 on a monthly basis with sales tax collections totalling approximately \$100,000.00. During the relevant period, petitioner timely filed returns and paid the taxes due for some months while other monthly returns were

filed and taxes paid late. Given the fact that petitioner had the ability to timely file and pay some months and considering the volume of sales and the amount of sales tax collections for the businesses during this period, when compared to the extent of the funds lost by the other corporations three years earlier, I conclude that the embezzlement of funds in 1988 and 1989 did not establish reasonable cause to abate penalties and interest assessed for the late filing and remittance by petitioner of taxes due in 1992.

Moreover, the fact that the IRS abated penalties through December 1992 or that the Division abated penalties on related cases based on the same facts for prior periods are not relevant grounds for abating penalties and interest for the period at issue.

C. The Division of Taxation was a party to the hearing and the Commissioner for the Division may delegate any of his employees to participate in the hearing process. The Division's representative at the hearing requested and was granted time to submit a memorandum of law. The fact that a different individual prepared the memorandum was not improper and petitioner's request to disregard the memorandum is without merit.

D. The petition of Winchester Properties, Inc. T/A Sign of the Dove is denied and the notices and demands issued December 21, 1992 and February 26, 1993 are sustained.

DATED: Troy, New York
June 12, 1997

Arthur Johnson
PRESIDING OFFICER